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CASE NO.: 89-1689

in the Supreme Court of the United States

October Term, 1989

JOHN P. O'MALLEY and JAMES A. NESBITT

Petitioners,

vs.

FATHER PATRICK H. O'NEILL, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

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May 25, 1990

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QUESTION PRESENTED FOR REVIEW

WHETHER A TERMINATION OF EMPLOYMENT FOR REFUSAL TO PARTICIPATE IN A PATTERN OF RACKETEERING IS ACTIONABLE UNDER THE RICO STATUTE

LIST OF PARTIES

Plaintiffs:

John P. O'Malley
James A. Nesbitt

Defendants:

Father Patrick H. O'Neill
St. Thomas University, Inc.
J. Pepe Fanjul
Kenneth Whittaker
Doug Adams
John Allen, M.D.
Jerome Blank
The Reverend Thomas Bogardus, O.S.A.
Mike Cameron
Alice Carney
Christina De Heron Noble
The Reverend John E. Deegan, O.S.A.
The Reverend John M. Driscoll, O.S.A.
The Very Reverend Joseph Duffey, O.S.A.
Ken Jenne
Ken Laurence
Irma Baker Lyons
Eugene F. Malon
Nicolas H. Morley
The Reverend William Murray, O.S.A.
Dr. Ricardo Pines
Ken Plante
Evelyn Poole
The Reverend Michael Scanlon, O.S.A.
Martin Taplin

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OPINIONS BELOW

The opinion of the Court of Appeals is reported: *O'Malley v. O'Neill,* 887 F.2d 1557 (11th Cir. 1989). The opinion of the District Court is not reported. Both opinions are included in Petitioners' Appendix.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeals entered the judgment which Petitioners seek to review on November 14, 1989, and denied a petition for rehearing and a suggestion for rehearing en banc on January 25, 1990. This Court's jurisdiction has been invoked pursuant to 28 U.S.C. Section 1254 (1982).

STATUTES INVOLVED

Petitioners filed suit for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961, et seq. (1982), the text of which is reproduced in Petitioners' Appendix.

REASONS FOR DENYING THE WRIT

Petitioners have asked this Court to exercise its discretionary jurisdiction based upon what Petitioners perceive to be a conflict between the decision of the Eleventh Circuit Court of Appeals in the instant case and decisions issuing from this Court and various other circuit courts of appeal. The scope of this Court's certiorari jurisdiction is narrow. A purported conflict must truly be direct, and must be readily apparent from the lower court's rationale or result. *United States v. Dowe*, 465 U.S. 605, 610 (1984); *Lugar v. Edmundson Oil Company*, 457 U.S. 922, 926 (1982); *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977). As Respondent will explain, the conflict which is necessary to justify an exercise of certiorari jurisdiction simply does not exist in this instance.

Contrary to Petitioners' assertion, the holding of the Court of Appeals is entirely consistent with this Court's decision in *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985). The Eleventh Circuit's conclusion, i.e., that Plaintiffs were unable to state a claim upon which relief could be granted to the extent that they failed to demonstrate that they had been injured by the alleged acts of mail fraud, is entirely consistent with the holding in *Sedima*, that "the plaintiff only has standing if, and can only recover to the extent that, *he has been injured* in his business or property *by the conduct constituting the violation.*" 473 U.S. at 496. (Emphasis added.)

The language that this Court chose to utilize in enunciating this standard is critical. The *Sedima* Court

specifically provided that a RICO injury must have been caused *by the conduct constituting the violation.* This holding is merely a restatement of the civil remedies portion of the RICO statute itself, which authorizes a civil suit by "*any person injured* in his business or property *by reason of a violation of section 1962* . . . ." 18 U.S.C. Section 1964.

As the Eleventh Circuit observed, neither in their complaint nor in their RICO case statement did the Plaintiffs claim that they had been injured by the alleged acts of mail fraud. Rather, Petitioners specifically alleged that their injury arose when they were terminated as a result of their refusal to participate in or conceal the fraudulent scheme.

In its opinion, the Eleventh Circuit recounted the allegations before it in the light most favorable to the Plaintiffs.

> O'Malley and Nesbitt discovered that St. Thomas University was operating at a deficit and that O'Neill was concealing its true financial condition through various means. In the course of preparing a budget proposal for the 1986-1987 school year, the plaintiffs learned that O'Neill was concealing a deficit by using restricted federal student assistance to offset St. Thomas' operating expenses; and that he was obtaining Federal government and private grants requiring matching funds when St. Thomas had no matching funds available. Further, they learned that O'Neill distorted St. Thomas' financial statements by basing budget projections on non-existent pledges of financial support. In addition, O'Neill permitted foreign students to attend St. Thomas without visas required by Federal law. On one occasion O'Neill asked Nesbitt to send a false verification form to the immigration and naturalization service, but Nesbitt refused.

> In August of 1986, O'Malley and Nesbitt confronted O'Neill and urged him to make a full disclosure of the true financial condition of St. Thomas. O'Neill refused to do so, however, and insisted that he would make up the difference through his own fund raising efforts.
>
> After repeated confrontations between plaintiffs and O'Neill over management of St. Thomas, O'Neill sent a letter to O'Malley demanding his resignation. On October 3, 1986, O'Neill terminated Nesbitt. On the same date, at the request of O'Neill, the board of trustees, acting through defendants J. Pepe Fanjul and Kenneth Whittaker, again informed O'Malley that he must resign by October 5, 1986 or be terminated. When he refused to submit his resignation, he was terminated.[1]

The court noted that the only predicate acts upon which the Plaintiffs based their RICO claims were alleged acts of mail fraud under 18 U.S.C. Section 1341 (1982).

Based upon the Plaintiffs' own pleadings, it is clear that the proximate cause of their alleged injury was *not* the mail fraud scheme itself. Rather, any injury to the Plaintiffs was caused by the termination of their employment. Therefore, the conduct which constituted the predicate act violation did not actually injure the Plaintiffs. Further, the connection between the Plaintiffs' alleged termination as a result of their refusal to participate in the "scheme" and the predicate acts themselves is entirely too tenuous to establish a basis for RICO liability.

Accepting Plaintiffs' allegations as true, Plaintiffs have established two separate series of tortious acts which were committed by Defendant O'Neill. The first set consists of

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[1]As the Eleventh Circuit noted in its opinion, while the court assumed the allegations to be true for purposes of the appeal, these allegations have been "hotly disputed by the defendants."

the predicate act of mail fraud which was purportedly committed by Father O'Neill. The second set of tortious acts involved the termination of O'Malley and Nesbitt by the Defendants. While the Plaintiffs presumably can demonstrate injury as a result of the second set of tortious acts, i.e., their termination, they cannot establish injury solely as a result of the predicate act of mail fraud. In other words, had the Plaintiffs not been terminated, Plaintiffs would have suffered no recognizable injury even had the alleged mail fraud continued. Plaintiffs were injured only when and because they were terminated.

Petitioners have attempted to improperly characterize this Court's holding in *Sedima* through a strained, out-of-context reference to a limited portion of the opinion of the Court of Appeal, rather than through direct citation to this Court's opinion in *Sedima*. Specifically, Petitioners have stated that: "This Court instead recognized that, to borrow the Court of Appeals' phrase here, there is 'no principled difference' between 'direct injury' and 'indirect injury.'" Petitioners' characterization totally misinterprets this Court's actual holding in *Sedima*, and does not otherwise properly characterize the holding of the Eleventh Circuit.

This Court did not conclude in *Sedima* that there was no real difference between direct injury and indirect injury, as far as the RICO Statutes are concerned; rather, the Court simply noted that there is no requirement that the complaining party demonstrate a "racketeering injury" which is separate and apart from any injury that was caused by the predicate acts themselves.

In this instance, the Eleventh Circuit did not disallow the Plaintiffs' claim based upon the perception that there had to be an injury to the complaining parties that could truly be characterized as a "racketeering injury," in addition to or in place of an injury that directly flowed from the predicate acts themselves. Nor did the court feel that it was necessary to artificially distinguish between direct and

indirect injury. Rather, the Court simply concluded that Petitioners' injury did not have the requisite causal nexus with the predicate acts to establish a viable RICO claim.

The Statute at issue, 18 U.S.C. Section 1964(c) (1982), reads as follows:

> Any person *injured in his business or property by reason of a violation of section 1962* of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee (emphasis added).

Thus, in order to have standing to sue for damages under section 1964(c) the plaintiffs must show: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the injury. *See Haroco v. American Bank and Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). We assume that discharge from employment constitutes an injury to "business or property." *Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987). We also assume that the complaint sufficiently alleges predicate acts of mail fraud, and focus our attention on the issues of standing and causation.

Section 1964(c) itself provides little guidance as to the precise meaning of the words "by reason of." However, the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), discussed this requirement. The *Sedima* Court concluded that 'the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or

> property by the conduct constituting the violation.' 473 U.S. at 496, 105 S.Ct. at 3285. In other words, 'the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . . Any recoverable damages occurring by reason of a violation of Section 1962(c) will flow from the commission of the predicate acts.' 473 U.S. at 497, 105 S.Ct. at 3285. The language 'by reason of' in section 1964(c) imposes a proximate causation requirement on the plaintiffs. *O'Malley v. O'Neil*, 887 F.2d. at 1561.

In fact, Petitioners cannot reasonably suggest that they suffered even an indirect injury *as a result of the predicate acts*.

Petitioners cite to the Eighth Circuit's decision in *Alexander Grant and Company v. Tiffany Industries, Inc.*, 749 F.2d 408 (8th Cir. 1984), vacated, 473 U.S. 922 (1985) (for reconsideration in light of *Sedima*), *on remand*, 770 F.2d 717 (8th Cir. 1985) (adhering to original result), *cert denied*, 474 U.S. 1058 (1986), as authority for the proposition that a direct injury solely from predicate acts is *not* required in order to establish a RICO claim. Respondent would submit that the question of direct versus indirect injury is not dispositive of the issues that were raised in this matter. To the contrary, while the Eleventh Circuit certainly noted in its opinion that some courts "have held that indirect injury is sufficient to confer standing," *O'Malley v. O'Neill*, 887 F.2d at 1561, n.6, the court focused on the Plaintiffs' inability to establish a "causal nexus between the predicate acts and the loss of their jobs."

Petitioners maintain that *Tiffany* is consistent with *Sedima*. Respondent agrees with that assessment, to the extent that it is clear from a review of the Eighth Circuit's decision upon remand that the court recognized that there must necessarily be a causal relationship between a RICO predicate act and the injuries which are at issue before a

claim may be properly stated under Section 1961(c). However, in that regard, the *Tiffany* decision is entirely consistent with the Eleventh Circuit's opinion in this matter.

In its original decision in *Tiffany*, the Eighth Circuit concluded that Grant had been injured by the acts of mail and wire fraud that had been committed by Tiffany, and that it had suffered an injury "by reason of" Tiffany's alleged violation of Section 1962(c). However, the Eighth Circuit felt that the plaintiff had failed to allege "some type of 'racketeering enterprise injury,'" which the Court deemed to be a necessary component of a RICO claim. In *Sedima*, this Court made it clear that the so-called "racketeering injury" was not in fact required in order to state a civil RICO claim. Nevertheless, on remand, the Eighth Circuit concluded that the plaintiff still had standing to maintain a RICO action against Tiffany, since Grant had alleged that it had been injured "by reason of" a violation of Section 1962.

The holding of the Eighth Circuit in the second *Tiffany* decision is wholly consistent with *Sedima* and with the decision of the Eleventh Circuit Court of Appeals in this case. The distinction between *Tiffany* and *O'Malley* is factual. Simply put, the plaintiffs in *Tiffany* sustained an injury as a result of the predicate acts of mail fraud; the Plaintiffs in the instant case did not.

The allegations which Grant made against Tiffany were as follows:

> The first allegation is that Kahn, in an effort to inflate the value of Tiffany inventory, falsely represented to Grant that Steelabrade Corporation, a supplier of products to Tiffany, held $500,000 worth of Tiffany inventory as of March, 1978. Grant requested confirmation of this claim from Steelabrade president James Murphy. Kahn and Martin, knowing Murphy would not comply, instead requested that he compile a schedule of all

purchases of Steelabrade products by Tiffany during 1977. The two then attached a copy of Grant's confirmation request to the schedule and fraudulently inserted language above Murphy's signature stating that "[t]his inventory was at our premises at December 31, 1977, and March 1, 1978." These documents were then mailed to Grant.

Grant's second claim of fraud concerns an alleged sale of $3,500,000 worth of Tiffany products to the government of Nigeria. Grant learned through the course of its audit that a substantial portion of the products sold had not yet been purchased by Tiffany. Grant questioned whether Tiffany could, under these circumstances, record in its financial statements the substantial earnings resulting from this sale. In response, Tiffany personnel stated that the sale should be certified because they had issued purchase orders for the products as of June 30, 1977, and that the products were held by ten suppliers who were simply awaiting further shipping instructions. Grant requested confirmation of this claim from the ten suppliers. Kahn and Martin backdated purchase orders and mailed to Grant forged letters from the suppliers confirming the representations made by Tiffany personnel. Grant, still apprehensive, sought "reconfirmation" of the same information. Kahn and Martin then pressured six suppliers to sign and mail reconfirmation letters back to Grant. 742 F.2d at 409-410.

Grant alleged that it had suffered a theft of services as a result of these and other acts of mail fraud, in that the fraud required it to spend substantially more time on the Tiffany audit than would have otherwise been necessary. This caused a commensurate increase in fees, and none of those fees had been paid. Grant further contended that the

resulting SEC investigation (which was initiated when Grant reported its concerns to the SEC) caused it to incur extensive attorney's fees and other expenses. Grant finally maintained that the fraud had damaged its reputation as a national independent public accounting firm. 770 F.2d at 719.

Clearly, therefore, Grant was injured "by reason of" the predicate act of mail fraud. Grant's claim was *not* based solely upon the suggestion that Grant had been injured when Tiffany terminated its use of Grant's services, after Grant "blew the whistle" on Tiffany's mail fraud.[2]

In this case, Petitioners cannot claim that they were injured "by reason of" the predicate acts. Petitioners' injuries, if any, stem from what they characterize as a retaliatory termination, which was arguably related to their failure to participate in the so-called RICO scheme.[3]

Respondent does not dispute that Petitioners would have a cause of action for RICO violations if "retaliatory termination" was among those predicate acts that are delineated in 18 U.S.C. Sections 1961 and 1962. However, retaliatory firing is not among those predicate acts that are included within the statute. Mail fraud is.

Petitioners further argue that the Eleventh Circuit's decision is in conflict with the Eighth Circuit's decision in *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772

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[2]Moreover, Grant actually alleged that Tiffany had directed certain fraudulent documents specifically to Grant, as part of its mail fraud scheme.

[3]In fact, Petitioners only alleged a single incident (involving Nesbitt) where they had refused to "participate" in the scheme. That incident involved Father O'Malley's request that Mr. Nesbitt enroll a foreign student who did not have the appropriate visa. Petitioners did not claim that either was fired because of this incident. Rather, they simply claimed in conclusory fashion that they were fired because they "refused to participate in or continue to conceal these wrongful acts."

F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1460, 89 L.Ed.2d 718 (1986) and the Second Circuit's decision in *Sperber v. Boesky*, 849 F.2d 60 (2nd Cir. 1988). Both of those cases allowed recovery by individuals who were not the *target* of the predicate acts, but who were nonetheless injured by those acts, albeit indirectly.

In *Terre Du Lac*, the plaintiff landowner's association alleged that the defendants' acts of mail fraud injured the association by causing an increase in the cost of maintaining roads in the *Terre Du Lac* subdivision. Those costs allegedly increased because the defendants invested money which they had obtained from the mail fraud in their own operations, rather than using the money to improve the subdivision roads, and because the mail fraud scheme caused more lots to be sold, resulting in more roads and greater usage of those roads, which had to be maintained. Thus, while the association did not assert that it was the target of the mail fraud itself, it did allege that it had sustained damage as a direct result of the mail fraud, and *not* as a result of some second set of tortious acts.

The decision of the Second Circuit Court of Appeals in *Sperber* is enlightening, particularly, given its discussion of this court's holding in *Sedima*.

> The leading case dealing with the "by reason of" language of RICO is *Sedima*, which held that damages caused directly by the predicate acts of a RICO violation are recoverable. It did not focus on the issue raised by this appeal: to what extent are damages caused only indirectly by the predicate acts recoverable? (By damages caused only "indirectly," we mean "racketeering" injury, "competitive" injury or injury caused by the total effect of the pattern of racketeering in the enterprise.) *Sperber*, *supra* at 63.

The court then observed that regardless of whether the standard for recovery requires direct or indirect damage from the predicate act, the plaintiffs had been unable to demonstrate the requisite causal nexus to sustain a RICO claim.

Utilizing the Second Circuit's definition of what constitutes an indirect injury, it is clear that the injury which is being claimed by Petitioners in this matter does not qualify as a compensable claim under RICO. The injury which Petitioners claim cannot be considered as either a "racketeering injury," or a "competitive injury." Nor was this injury caused by the total effect of the pattern of racketeering which was involved in the enterprise. Rather, Petitioners seek to recover for an injury which resulted solely from their termination.

Petitioners fail to comprehend that their case is not like *Sedima, Tiffany, Terre Du Lac* or *Sperber*. In all of those cases, there was one set of tortious acts — the predicate acts — which gave rise to the RICO claim. It was that set of tortious acts which caused injury to the plaintiffs in those cases, directly or indirectly.

In this case, there were in effect two sets of tortious acts. The first set of tortious acts consisted of the alleged incidents of mail fraud; those constituted the requisite predicate acts which could give rise to a RICO claim. Petitioners suffered no injury — either direct or indirect — as a result of those acts.

The second set of tortious acts involved the termination of Petitioners O'Malley and Nesbitt. Petitioners did suffer a very direct injury from the second set of tortious acts. Those acts, however, cannot be considered predicate acts under 18 U.S.C. Section 1964, and in no way gave rise to a RICO claim.

The decision of the Eleventh Circuit Court of Appeals in this case does *not* conflict with this Court's decision in

Sedima, or with any of the circuit court decisions that have been cited by Petitioners. Any apparent conflict disappears when the facts of the various cases are analyzed closely. No basis therefore exists for this Court to accept jurisdiction in this matter to reconsider those issues which were properly resolved by the Eleventh Circuit. Nor do those issues require reconsideration, given the Eleventh Circuit's faithful adherence both to this Court's decision in *Sedima*, and to the express language of 18 U.S.C. Section 1964(c) (1982).

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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